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# Two-Thirds of an Evidentiary Requirement: Are Courts Too Strict in Construing the Two-Thirds Citizenship Requirement of the CAFA Home-State Exception?

John P. Orellana  
*IIT Chicago-Kent College of Law*

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**TWO-THIRDS OF AN EVIDENTIARY  
REQUIREMENT: ARE COURTS TOO STRICT IN  
CONSTRUING THE TWO-THIRDS CITIZENSHIP  
REQUIREMENT OF THE CAFA HOME-STATE  
EXCEPTION?**

JOHN P. ORELLANA \*

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INTRODUCTION

On February 18, 2005, Congress enacted the Class Action Fairness Act (CAFA), which expanded federal jurisdiction over class actions of national and interstate interest.<sup>1</sup> CAFA essentially loosened the requirements for federal diversity jurisdiction under 28 U.S.C. § 1332 for class actions, requiring defendants to only show that (1) the class consists of at least 100 members, (2) a single member of the class

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\* J.D. candidate, May 2012, Chicago-Kent College of Law, Illinois Institute of Technology.

<sup>1</sup> Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat. 4 (“The purposes of this Act are to . . . restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction.”); *Hart v. FedEx Ground Package Sys., Inc.*, 457 F.3d 675, 681 (7th Cir. 2006) (“The [Senate Judiciary] Committee report said ‘[o]verall, [CAFA] is intended to expand substantially federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.’”).

is a citizen of a state or foreign country different from any defendant (minimal diversity),<sup>2</sup> and (3) the *aggregated* amount in controversy is at least \$5,000,000.<sup>3</sup> This differs from the ordinary basis of jurisdiction, requiring *every* plaintiff to be of different citizenship from *every* defendant (complete diversity)<sup>4</sup> and further requiring every plaintiff to plead a good faith claim of at least \$75,000.<sup>5</sup> CAFA further eliminated removal requirements that mandate unanimous consent among defendants and place a one-year deadline to take such action.<sup>6</sup> Moreover, CAFA does not apply retroactively to cases filed before its enactment, effectively making it a substantive, rather than a procedural, measure.<sup>7</sup>

Despite the increased jurisdictional flexibility provided by CAFA, the Act has been touted as a measure of class action reform to prevent abuses, such as forum shopping by plaintiffs to maximize state bias against out-of-state defendants.<sup>8</sup> Other concerns addressed by CAFA are adverse effects on interstate commerce resulting from states

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<sup>2</sup> See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967) (“Article III [of the United States Constitution] poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as *any* two adverse parties are not co-citizens.”) (emphasis added).

<sup>3</sup> 28 U.S.C. § 1332(d) (2006).

<sup>4</sup> See *Strawbridge v. Curtiss*, 7 U.S. 267, 267–68 (1806) (“The court understands [federal diversity jurisdiction] to mean that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts.”).

<sup>5</sup> *Mas v. Perry*, 489 F.2d 1396, 1400 (5th Cir. 1974).

<sup>6</sup> 28 U.S.C. § 1453(b) (2006).

<sup>7</sup> *Knudsen v. Liberty Mutual Ins. Co.*, 411 F.3d 805, 807–08 (7th Cir. 2005) (CAFA jurisdiction requirements did not apply to case filed before enactment, even where plaintiffs amended the class definition after enactment); see also Meghan J. Dolan, *Seventh Circuit Moves to the Head of the Class: Recent Decisions Provide a Broad Interpretation of Federal Jurisdiction Under CAFA*, 1 SEVENTH CIRCUIT REV. 1 (2006), at <http://www.kentlaw.edu/7cr/v1-1/dolan.pdf>.

<sup>8</sup> *In re Hannaford Bros. Co. Consumer Data Sec. Breach Litig.*, 564 F.3d 75, 80–81 (1st Cir. 2009) (“According to Congress, these abusive practices included forum shopping to take advantage of potential state court biases against foreign defendants.”).

imposing their laws on citizens of other states by adjudicating suits of national significance.<sup>9</sup>

## I. BACKGROUND

### A. *Exceptions to CAFA Jurisdiction*

However, plaintiffs seeking to keep their suit in state court are not without remedy: under the *home-state* and *local controversy* exceptions, a federal district court must decline jurisdiction.<sup>10</sup> The home-state exception provides that a federal district court must decline jurisdiction where (1) “two-thirds or more of the members of all proposed plaintiff classes in the aggregate and (2) the primary defendants, are *citizens* of the State in which the action was originally filed.”<sup>11</sup>

Under the local controversy exception, a federal district court must decline jurisdiction where “greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed” and there is at least *one defendant* “[1] from whom significant relief is sought . . . ; [2] whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and [3] who is a citizen of the State in which the action was originally filed.”<sup>12</sup> In addition, the

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<sup>9</sup> *Id.* at 81 (“Congress in enacting CAFA was concerned that state courts were ‘making judgments that impose their view of the law on other States and bind the rights of the residents of those states.’”); Pub. L. No. 109-2, 119 Stat. 4 (“[Congress finds that] [a]buses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are— (A) keeping cases of national importance out of Federal court; (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.”).

<sup>10</sup> 28 U.S.C. § 1332(d)(4)(A)–(B) (2006).

<sup>11</sup> *Id.* § 1332(d)(4)(B).

<sup>12</sup> *Id.* § 1332(d)(4)(A).

principal injuries of the plaintiff class must have occurred in the State, and there must have been no other class action asserting similar factual allegations filed against the defendants within the preceding three years.<sup>13</sup>

Additionally, a federal district court may, *at its discretion*, choose to decline jurisdiction where “greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed” and where remand to state court would serve the interests of justice under the totality of the circumstances.<sup>14</sup> However, this exception is not discussed in this article.

### *B. Burden of Proof and Evidentiary Standard for Establishing Two-Thirds State Citizenship*

For purposes of diversity jurisdiction, a party who establishes his or her domicile in a state simultaneously establishes his or her state citizenship.<sup>15</sup> An individual originally establishes his or her place of birth as his or her domicile, and this domicile presumptively continues until the individual establishes (1) a new *residence* and (2) an *intention* to remain there.<sup>16</sup>

For purposes of evaluating the two-thirds state citizenship requirement, most federal circuits have held that plaintiffs seeking to keep their case in state court under the home-state or local controversy

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* § 1332(d)(3).

<sup>15</sup> *Stine v. Moore*, 213 F.2d 446, 448 (5th Cir. 1954) (“With respect to the diversity jurisdiction of the federal courts, citizenship has the same meaning as domicile. It imports permanent residence in a particular state with the intention of remaining, and is not dependent on birth. Residence alone is not the equivalent of citizenship, although the place of residence is *prima facie* the domicile; and citizenship is not necessarily lost by protected absence from home, where the intention to return remains.”).

<sup>16</sup> *Palazzo v. Corio*, 232 F.3d 38, 42 (2d Cir. 2000).

exceptions bear the burden of proof.<sup>17</sup> Indeed, this approach is consistent with the Supreme Court’s general view on removal jurisdiction, allocating the burden to the party claiming an exception from jurisdiction.<sup>18</sup>

Moreover, plaintiffs’ burden of proof is met by a *preponderance of the evidence* showing that two-thirds of the class members are individuals domiciled or corporations organized in the state.<sup>19</sup> However, plaintiffs are not burdened with the gargantuan task of showing the citizenship of every individual class member.<sup>20</sup> Rather, judicial economy dictates that this evidentiary standard is based on “practicality and reasonableness.”<sup>21</sup> This burden of proof and

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<sup>17</sup> *Hart v. FedEx Ground Package Sys., Inc.*, 457 F.3d 675, 680 (7th Cir. 2006) (following the Senate Judiciary Committee report, which states: “[I]t is the intent of the Committee that the named plaintiff(s) should bear the burden of demonstrating that a case should be remanded to state court (e.g., the burden of demonstrating that more than two-thirds of the proposed class members are citizens of the forum state). Allocating the burden in this manner is important to ensure that the named plaintiffs will not be able to evade federal jurisdiction with vague class definitions or other efforts to obscure the citizenship of class members.”); *In re Hannaford Bros. Co. Consumer Data Sec. Breach Litig.*, 564 F.3d 75, 77 (1st Cir. 2009); *Kaufman v. Allstate N.J. Ins. Co.*, 561 F.3d 144, 153 (3d Cir. 2009); *Preston v. Tenet Healthsystem Mem’l Med. Ctr., Inc. (Preston II)*, 485 F.3d 804, 813 (5th Cir. 2007); *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1024 (9th Cir. 2007); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1165 (11th Cir. 2006).

<sup>18</sup> *Breuer v. Jim’s Concrete of Brevard, Inc.*, 538 U.S. 691, 698 (2003) (“[W]henver the subject matter of an action qualifies it for removal, the burden is on a plaintiff to find an express exception.”).

<sup>19</sup> 28 U.S.C. § 1332(a), (c); *In re Sprint Nextel Corp.*, 593 F.3d 669, 673 (7th Cir. 2010) (“[T]he plaintiffs had to establish by a preponderance of the evidence that two-thirds of their proposed class members are Kansas citizens”); *Preston II*, 485 F.3d at 813–14 (“[T]he party moving for remand under the CAFA exceptions to federal jurisdiction must prove the citizenship requirement by a preponderance of the evidence.”).

<sup>20</sup> *Preston II*, 485 F.3d at 816 (“From a practical standpoint, class action lawsuits may become ‘totally unworkable in a diversity case if the citizenship of all members of the class, many of them unknown, had to be considered.’”) (citations omitted).

<sup>21</sup> *Id.*

evidentiary standard is identical under the home-state, local controversy, and discretionary CAFA jurisdiction exceptions.<sup>22</sup>

## II. THE SEVENTH CIRCUIT'S APPROACH

Recently, in *In re Sprint Nextel Corporation*, the plaintiffs brought suit for themselves and on behalf of the class of all Kansas residents who purchased text messaging services from the defendant, Sprint Nextel, over a three-year period.<sup>23</sup> The plaintiffs alleged that Sprint Nextel “conspired with other cell phone providers to impose artificially high prices for text messaging service.”<sup>24</sup> The plaintiffs specifically limited the class to those Kansas *residents* who (1) had a Kansas cell phone number and (2) received their cell phone bills at a Kansas mailing address.<sup>25</sup>

The defendant removed the action to the United States District Court for the District of Kansas under CAFA, providing evidence of five non-Kansan class members meeting the plaintiffs' criteria, *i.e.*, national corporations lacking state citizenship but subscribing to Kansas cell phone service and receiving their bills at Kansas mailing addresses.<sup>26</sup> The Multi-District Litigation panel subsequently transferred this and over a dozen similar cases to the Northern District of Illinois.<sup>27</sup> Thereafter, the plaintiffs successfully remanded the case to Kansas state court under the home-state exception of CAFA.<sup>28</sup> The district court found that, despite providing no evidence of citizenship, the plaintiffs had narrowly “defined the putative class in such a way as

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<sup>22</sup> *Id.* at 812.

<sup>23</sup> *Nextel Corp.*, 593 F.3d at 671.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* The plaintiffs presented a third limiting class factor as those who paid a long distance Kansas “USF fee,” but the court found this factor irrelevant. *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

to leave little doubt that at least two-thirds of the class members are Kansas citizens.”<sup>29</sup>

On the defendant’s appeal, the Seventh Circuit reversed and rejected the contention that the plaintiffs’ proposed class met the two-thirds citizenship requirement of the home-state exception.<sup>30</sup> Although the court agreed that in-state cell phone numbers and mailing addresses provided evidence of an extended stay in Kansas by class members, it was questionable whether all such individuals actually intended to remain in the state as citizens because many of those individuals were potentially out-of-state college students or military personnel.<sup>31</sup> Indeed, being a resident of a state is not equivalent to being a domiciliary.<sup>32</sup>

Yet, despite its ruling, the court acknowledged the appeal of drawing the inference that a class of individuals maintaining in-state cell phone numbers and mailing addresses are citizens of the state, particularly noting that the largest military base and largest university in Kansas contained only 10,000 members each, as compared to Kansas’s total population of 2.8 million<sup>33</sup>:

[O]ne would think that the vast majority of individual Kansas cell phone users do in fact live in that state and that the vast majority of them view it as their true home. True, some of those residents are college

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<sup>29</sup> *Id.*; see *In re Text Messaging Antitrust Litig.*, Nos. 08 C 7082, 09 C 2192, 2009 WL 2488301, at \*3 (N.D. Ill. Aug. 13, 2009), *vacated by Nextel Corp.* 593 F.3d 669 (“Though undoubtably some members of the putative class are individuals who, since January 2005, have moved away from Kansas or are out-of-state college students who do not intend to reside in Kansas permanently, those facts do not alter the reality that plaintiffs have defined the putative class in such a way as to leave little doubt that at least two-thirds of the class members are Kansas citizens.”).

<sup>30</sup> *Nextel Corp.*, 593 F.3d at 674.

<sup>31</sup> *Id.* at 673–74.

<sup>32</sup> *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989) (“Domicile is not necessarily synonymous with residence, and one can reside in one place, but be domiciled in another.”) (citations and quotations omitted).

<sup>33</sup> *Nextel Corp.*, 593 F.3d at 674.

students from other states or others, such as soldiers, who come to Kansas without the intent to remain indefinitely. But it's hard to believe that those nondomiciliaries are collectively more than a drop in the bucket when it comes to class composition. The population of Kansas is approximately 2.8 million people, . . . but the state's biggest military base, Fort Leavenworth, is home to only 10,000 soldiers and family members, . . . and the out-of-state population of the University of Kansas, the state's biggest school is under 10,000 . . .<sup>34</sup>

The court also considered it unlikely that a substantial number of businesses providing Kansas cell phone numbers to their employees and receiving the bills in Kansas would be out-of-state companies; a business would presumably have billing items sent to the "administrative head," a strong candidate for the company's principal place of business.<sup>35</sup>

Nonetheless, the court found the plaintiffs' class definition insufficient to show by a preponderance of the evidence that two-thirds of class members were Kansas citizens, broadly stating, "we agree with the majority of district courts that a court may not draw conclusions about the citizenship of class members based on things like their phone numbers and mailing addresses."<sup>36</sup> In so holding, the Seventh Circuit has substantially hampered plaintiffs' ability to remain in state court, removing the common sense approach that several other courts have taken by requiring additional evidence of citizenship.

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<sup>34</sup> *Id.* at 673–74 (citations omitted).

<sup>35</sup> *Id.* at 674.

<sup>36</sup> *Id.*

### III. SEVENTH CIRCUIT'S SOLUTIONS

#### A. Tailoring Class Definitions

Other courts have held that plaintiffs may freely tailor their class definitions to fit within a CAFA exception and avoid federal jurisdiction,<sup>37</sup> at least under CAFA's home-state and local controversy exceptions.<sup>38</sup>

*In re Hannaford Brothers Company Consumer Data Security Breach Litigation* specifically addressed the rationale behind allowing plaintiffs to carve out definitions defeating CAFA jurisdiction.<sup>39</sup> First, by defining class members as state citizens, or "narrowing their pleadings" to fit within an in-state exception, plaintiffs potentially decrease the size of their class and consequently, total damages and settlement leverage.<sup>40</sup> Second, by keeping their suit in state court, plaintiffs also potentially sacrifice claims and legal theories that are exclusively available in federal courts.<sup>41</sup> Third, the home-state exception (which requires the primary defendants to be state citizens) and the local controversy exception (which requires that one defendant be a state citizen from whom significant relief is sought) minimize the potential out-of-state bias against defendants by requiring defendants to have significant presence in the state.<sup>42</sup> Likewise, the requirement

<sup>37</sup> *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 564 F.3d 75, 77 (1st Cir. 2009); *Johnson v. Advance Am.*, 549 F.3d 932, 937 (4th Cir. 2008).

<sup>38</sup> *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 592 F. Supp. 2d 146, 148 n.3 (D. Me. 2008) ("There is one section of CAFA that encourages the court in some instances to prevent a plaintiff from circumventing federal jurisdiction (instructing the federal court to consider 'whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction,' 28 U.S.C. § 1332(d)(3)(C), but it does not apply to subsection (4), the provision applicable here.)").

<sup>39</sup> *In re Hannaford Bros.*, 564 F.3d at 80–81.

<sup>40</sup> *Id.* at 80.

<sup>41</sup> *Id.*

<sup>42</sup> *See id.* at 80–81 ("According to Congress, these abusive practices included forum shopping to take advantage of potential state court biases against foreign defendants. But where, as here, the defendant is also a citizen of the forum state, the concern for bias simply does not arise.") (citations omitted).

of both the home-state and local controversy exceptions, that two-thirds of class members are citizens of the state, reduces the concern that state courts “mak[e] judgments that impose their view of the law on other States and bind the rights of the residents of those States,” because potentially only one-third of class members are citizens of other states.<sup>43</sup> Lastly, Congress is free to amend or create legislation if class definition tailoring to the home-state and local controversy exceptions creates an “undesirable loophole.”<sup>44</sup>

However, courts in the Sixth Circuit have disallowed complaint tailoring to defeat CAFA jurisdiction where they found “no colorable basis . . . other than to frustrate CAFA.”<sup>45</sup> For instance, in *Freeman v. Blue Ridge Paper Products, Inc.*, the plaintiffs sought to undercut CAFA’s \$5 million amount in controversy requirement and avoid federal jurisdiction by splitting their claims for injury into five separate suits covering five sequential time periods, each suit claiming only \$4.9 million in damages.<sup>46</sup> The Sixth Circuit held that the plaintiffs could not arbitrarily split their claims by time period in order to remain below the \$5 million amount in controversy requirement of CAFA while retaining the practical benefit of an *aggregated* claim of \$24.5 million.<sup>47</sup> In so holding, the court laid down the general rule that “where recovery is expanded, rather than limited, by virtue of splintering of lawsuits for no colorable reason, the total of such identical splintered lawsuits may be aggregated.”<sup>48</sup>

Similarly, in *Proffitt v. Abbott Laboratories*, the plaintiffs sought to circumvent federal jurisdiction by splitting their antitrust claims into eleven suits, each claiming \$4,999,000 in damages and

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 80.

<sup>45</sup> *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 406 (6th Cir. 2008); *Proffitt v. Abbott Labs.*, No. 2:08-CV-151, 2008 WL 4401367, at \*2 (E.D. Tenn. Sept. 23, 2008).

<sup>46</sup> *Freeman*, 551 F.3d at 406.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

covering different time periods.<sup>49</sup> The District Court for the Eastern District of Tennessee found the plaintiffs' division of the suits an arbitrary exercise for avoiding federal jurisdiction by undercutting CAFA's amount in controversy requirement, while retaining an aggregate potential damages award of \$54,989,000.<sup>50</sup> In finding that the plaintiffs' efforts were motivated purely by avoiding federal jurisdiction, the court noted that the named plaintiff and defendant were the same in each suit, and that each of the eleven complaints contained allegations concerning the entire scope of defendant's conspiracy.<sup>51</sup>

By contrast, in *Tanoh v. Dow Chemical Co.*,<sup>52</sup> the Ninth Circuit rejected aggregation of seven separate state tort claims against one manufacturer into a "mass action"<sup>53</sup> as a basis for removal to federal court where each suit contained less than 100 class members, thereby undercutting CAFA's numerosity requirement.<sup>54</sup> The court expressly distinguished *Freeman* and *Proffitt* on the basis that in those cases, class members overlapped among the separated suits, and such overlapping members (*i.e.*, members who were part of more than one suit) stood to gain in excess of the amount in controversy required under CAFA.<sup>55</sup>

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<sup>49</sup> *Proffitt*, 2008 WL 4401367, at \*1-2.

<sup>50</sup> *See id.* at \*2.

<sup>51</sup> *Id.* ("The only difference among the eleven lawsuits filed by plaintiff is the time period each is alleged to cover. The plaintiff and defendant are the same in each case, and it is clear to the court that the allegations cover one antitrust conspiracy concerning the same drug, TriCor. . . . [E]ach complaint contains allegations concerning the entire scope of the alleged conspiracy during various time periods throughout the full decade. . . . Other than the difficulty of making a damages disclaimer to avoid the CAFA, there appears no reason for selecting the one-year divisions and creating eleven lawsuits to litigate one conspiracy that involves one defendant and one drug.").

<sup>52</sup> 561 F.3d 945 (9th Cir. 2009).

<sup>53</sup> *See* 28 U.S.C. § 1332(d)(11)(B)(i) (2006).

<sup>54</sup> *Tanoh*, 561 F.3d at 956.

<sup>55</sup> *Id.* at 955 ("The concerns animating *Freeman* and *Proffitt* simply are not present in this case, as none of the seven groups of plaintiffs has divided its claims into separate lawsuits to expand recovery. To the contrary, each of the seven state

Alternatively, rather than splitting claims arbitrarily by time, as in *Freeman* and *Proffitt*, plaintiffs might have simply claimed an amount less than \$5,000,000.<sup>56</sup> However, defendants could have rebutted such a claim to remove to federal court by showing that plaintiffs' claims were "more likely than not" to meet CAFA's minimum amount in controversy.<sup>57</sup>

These cases indicate that, if the practical results are that plaintiffs retain the benefit of claiming an award surpassing CAFA's \$5 million amount in controversy requirement, they may not tailor their complaints to avoid federal jurisdiction.<sup>58</sup> However, plaintiffs have had success defining their class to include members with other indications of citizenship. Several options for circumscribing class definitions are available as courts consider a multitude of factors in determining domicile including "[1] voting registration and practices; [2] location of personal and real property; [3] location of brokerage and bank accounts; [4] location of spouse and family; [5] membership in unions and other organizations; [6] place of employment or business; [7] driver's license and automobile registration; and [8] payment of taxes."<sup>59</sup>

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court actions was brought on behalf of a *different* set of plaintiffs, meaning that none of the plaintiff groups stands to recover in excess of CAFA's \$5 million threshold between the seven suits.") (emphasis in original).

<sup>56</sup> See *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 407 (6th Cir. 2007) ("A disclaimer in a complaint regarding the amount of recoverable damages does not preclude a defendant from removing the matter to federal court upon a demonstration that damages are 'more likely than not' to 'meet the amount in controversy requirement,' but it can be sufficient absent adequate proof from defendant that potential damages actually exceed the jurisdictional threshold.").

<sup>57</sup> *Id.*

<sup>58</sup> See *Tanoh*, 561 F.3d 945 at 966; *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 406 (6th Cir. 2008); *Proffitt v. Abbott Labs.*, No. 2:08-CV-151, 2008 WL 4401367, at \*2 (E.D. Tenn. Sept. 23, 2008).

<sup>59</sup> *Kyung Park v. Holder*, 572 F.3d 619, 1301 (3d Cir. 1972).

## 1. Defining Class by Citizenship

To cure the plaintiffs' evidentiary woes, the *Nextel* court suggested that the plaintiffs simply define their class as all Kansas *citizens* who subscribed to the cell phone service of Nextel and received their bills in Kansas.<sup>60</sup> Indeed, such a class description requires, by definition, no evidence at all to establish the requisite proportion of citizenship.<sup>61</sup> At least two other circuits have allowed plaintiffs to define their members as citizens to defeat CAFA jurisdiction.<sup>62</sup>

However, the drawback to plaintiffs is that such a class definition reduces the total pool of members and consequently, recoverable damages from the suit.<sup>63</sup> Although such a class definition establishes with 100% certainty that all members of the class are citizens of the state, attorneys would be hesitant to limit their recoverable pool to this level when they could obtain a larger fee recovery by certifying a class potentially composed of one-third non-citizens.<sup>64</sup>

## 2. Defining Class Members by Residence

Pennsylvania courts have adopted reasoning similar to that of the Seventh Circuit. In *Schwartz v. Comcast Corp.*, the district court

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<sup>60</sup> *In re Sprint Nextel Corp.*, 593 F.3d 669, 676 (7th Cir. 2010).

<sup>61</sup> *See Johnson v. Advance Am.*, 549 F.3d 932, 937–38 (4th Cir. 2008); *see also In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 592 F. Supp. 2d 146, 148 n.2 (D. Me. 2008) (“Since the class by definition is limited to citizens of Florida, there is no need for evidence as to what percentage of the class is Florida citizenry.”).

<sup>62</sup> *See In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 564 F.3d 75, 77 (affirming district court decision that class defined to include only Florida citizens established that two-thirds of the class members were citizens of the state); *Johnson*, 549 F.3d at 937.

<sup>63</sup> *Sprint Nextel Corp.*, 593 F.3d at 676.

<sup>64</sup> *Id.* (“The tradeoff is that this definition would have limited the pool of potential class members, something that plaintiffs and their lawyers are apparently unwilling to do.”).

rejected the reasoning that residence is sufficient to establish that two-thirds of a putative class are domiciliaries of the state.<sup>65</sup> The plaintiffs' class was defined as "[a]ll persons and entities residing *or doing business* in the Commonwealth of Pennsylvania who subscribed to Comcast's high-speed internet service" over an approximately one-year period.<sup>66</sup> Solely addressing the *residential* subscribers,<sup>67</sup> the court found that a subscription to Internet service is not indicative of an intent to remain in the state, providing the example of college students who attend Pennsylvania colleges intermittently.<sup>68</sup> The court reasoned that Internet service is merely a "standard necessity" in homes and does not indicate domiciliary intent any more so than do "telephone, electric, cable, gas, water and other services."<sup>69</sup> In reaching this conclusion, the court also cited a Third Circuit case, *Krasnov v. Dinan*, where the court stated that one's place of residence serves as *prima facie* evidence of domicile, but is not sufficient by itself to establish domicile.<sup>70</sup>

Additionally, the court found that Internet subscribers "doing business" in the state likely encompassed a substantial group of non-citizens (and non-residents),<sup>71</sup> e.g., out-of-state commuters or Internet

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<sup>65</sup> No. Civ. A. 05-2340, 2006 WL 487915, at \*6 (E.D. Pa. Feb. 28, 2006) ("Absent evidence of any factor that bears on the class members' intent to remain in Pennsylvania, [the court is] unable to determine the domicile of plaintiff's residential class members.")

<sup>66</sup> *Id.* at \*3 (emphasis added).

<sup>67</sup> *Id.* at \*5. Defendant Comcast did not dispute the plaintiffs' assertion that 98% of residential subscribers were Pennsylvania residents. *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* The transient nature of Internet subscription contracts was presumably also the reason that the court rejected the plaintiffs' argument that 86.5% of class members demonstrated intent to remain in the state by maintaining service for over five months. *Id.*

<sup>70</sup> *Id.*; *Krasnov v. Dinan*, 465 F.2d 1298, 1300 (3d Cir. 1972) ("Where one lives is *prima facie* evidence of domicile, . . . but mere residency in a state is insufficient for purposes of diversity.")

<sup>71</sup> *Schwartz*, WL 487915 at \*6 ("Schwartz appears to assume that only class members who subscribe to Comcast's nonresidential internet service in Pennsylvania could be considered to be Comcast internet subscribers that are 'doing business' in

subscribers.<sup>72</sup> This was certainly a valid concern and probably sufficient alone for the court to deny remand to state court.

This conclusion is not outside the norm, as residence has never been equated to domicile or citizenship for diversity jurisdiction purposes.<sup>73</sup> However, residence has often been accepted as prima facie evidence of domicile.<sup>74</sup>

The term *prima facie* by legal definition describes evidence establishing a rebuttable presumption that what is asserted is true.<sup>75</sup> In fact, at common law, a prima facie showing has almost always been established where a plaintiff shows that his or her claim is more likely than not to be true. For instance, in *Allavi v. Ashcroft*, an Afghan alien moving to reopen removal proceedings under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), failed to meet the required prima facie showing that he was “more likely than not” going to be tortured if removed.<sup>76</sup> In *People v. Hood*, the Illinois Supreme Court used the “more likely than not” test to determine whether the prosecutor’s prima facie case had been made, where the prosecutor alleged the defendant had maintained possession of a firearm because it was found in his car.<sup>77</sup> In *State v. Watson*, the Connecticut Supreme Court also applied the “more likely than not” test to determine whether a prima facie showing of possessing a gun had been made where the gun was

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Pennsylvania. Because of this assumption, Schwartz fails to address the millions of Comcast internet subscribers across the nation that are not Pennsylvania citizens and could be considered to be ‘doing business’ in Pennsylvania.”).

<sup>72</sup> *Id.* at \*4 (“Comcast also asserts that there are approximately 200,000 citizens of other states who are ‘doing business’ in Pennsylvania by commuting to work in Pennsylvania and countless numbers of citizens from other states who are ‘doing business’ with Pennsylvania via the internet.”).

<sup>73</sup> *See Krasnov*, 465 F.2d at 1301.

<sup>74</sup> *Id.* at 1300.

<sup>75</sup> BLACK’S LAW DICTIONARY (8th ed. 2004) (“prima facie, *adj.* Sufficient to establish a fact or raise a presumption unless disproved or rebutted”).

<sup>76</sup> *Allavi v. Ashcroft*, 109 F. App’x 935, 936 (9th Cir. 2004).

<sup>77</sup> *People v. Hood*, 276 N.E.2d 310 (Ill. 1971).

found in defendant's car.<sup>78</sup> In *Saunders v. State*, the Delaware Supreme Court upheld a statute prohibiting possession of Molotov cocktails as constitutional because a possessor of Molotov cocktails was "more likely than not" intent on causing harm, thereby providing prima facie evidence of an intent to cause harm.<sup>79</sup> In *Sanderson v. International Flavors and Fragrances, Inc.*, the Court held that in personal injury cases, a prima facie showing of causation must be established by competent expert testimony establishing that the defendant's conduct was more likely than not the cause of the injury.<sup>80</sup> Similarly, a prima facie case for tort damages arising from food poisoning requires a showing that it is more likely than not that the food's condition caused the injury.<sup>81</sup>

What this demonstrates is that *prima facie* has often been synonymous with a showing that a fact is "more likely than not" to be true. Although a *preponderance of the evidence* standard has been the norm at common law in determining whether an individual was domiciled in a state,<sup>82</sup> residence has traditionally been insufficient to establish domicile<sup>83</sup> (indeed, it is only one of two elements required), despite it serving as prima facie evidence of domicile.<sup>84</sup> Were residence deemed sufficient to establish domicile and citizenship for purposes of diversity jurisdiction, domicile and citizenship would be rendered meaningless.

Accordingly, many courts have applied a rebuttable presumption of domicile once residency is established.<sup>85</sup> However,

<sup>78</sup> *State v. Watson*, 345 A.2d 532, 542-43 (Conn. 1973).

<sup>79</sup> *Saunders v. State*, 275 A.2d 564, 565 (Del. 1971).

<sup>80</sup> *Sanderson v. Int'l Flavors & Fragrances, Inc.*, 950 F. Supp. 981, 984 (C.D. Cal. 1996).

<sup>81</sup> *Foster v. AFC Enters., Inc.*, 896 So. 2d. 293, 296 (3d Cir. 2005).

<sup>82</sup> *Lyon v. Glaser*, 288 A.2d 12, 22 (N.J. 1972) ("[T]he State must establish the status of taxability, I.e., domicil [sic] by the preponderance of the credible evidence.").

<sup>83</sup> *Krasnov v. Dinan*, 465 F.2d 1298, 1300 (3d Cir. 1972).

<sup>84</sup> *Id.*

<sup>85</sup> *District of Columbia v. Murphy*, 314 U.S. 441, 455 (1941); *Sligh v. Doe*, 596 F.2d 1169, 1171 (4th Cir. 1979); *Fort Knox Transit v. Humphrey*, 151 F.2d 602,

many courts have not accepted residence as independently sufficient to establish this presumption. For instance, in *Preston v. Tenet Healthsystem Memorial Medical Center, Inc.* (hereinafter *Preston I*), the plaintiffs alleged that the defendant infirmary failed to maintain safe conditions on the premises and to provide adequate transportation to safety during Hurricane Katrina.<sup>86</sup> While the plaintiffs provided no evidence to show that at least two-thirds of the class was composed of Louisiana citizens, the defendants provided an affidavit from the director of medical records, indicating that 242 of 299 class members registered Louisiana as their primary residence.<sup>87</sup> The court refused to apply the rebuttable presumption of evidence on the basis of “presence in the state” alone, suggesting that the plaintiffs should have produced additional evidence showing, for example, “vehicle registration or an extended period of residency and employment in Louisiana prior to the forced evacuation prompted by Hurricane Katrina.”<sup>88</sup> Elaborating on its refusal to presume citizenship where only residence was shown, the court stated:

The cases cited [by the court] undeniably incorporate language amenable to an argument that the court may determine citizenship based solely on evidence of residency, but [the defendant] fails to appreciate that in these lawsuits, the moving party did not ultimately prevail just because the opposing party offered no rebuttal evidence. Instead, the court considered the entire record to determine whether the evidence of residency was simultaneously sufficient to establish citizenship . . . [The defendant’s] proposed approach for determining citizenship gives undue attention to the naked statements of law as opposed to the substance of

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602 (6th Cir. 1945); *Kelleam v. Md. Cas. Co. of Balt., Md.*, 112 F.2d 940 (10th Cir. 1940); *Bair v. Peck* 738 F.Supp. 1354, 1356 (D. Kan. 1990).

<sup>86</sup> *Preston v. Tenet Healthsystem. Mem’l Med. Ctr., Inc. (Preston I)*, 485 F.3d 793, 796 (5th Cir. 2007).

<sup>87</sup> *Id.* at 798.

<sup>88</sup> *Id.* at 800.

the relevant opinions. Based on the record, which includes only the primary billing addresses of the hospitalized patients, [the defendant] still fail[s] to establish the type of residency information reviewed in other circuits employing the presumption that a person's residency forms an adequate basis for inferring citizenship unless contested with sufficient evidence.<sup>89</sup>

However, the cases cited by the plaintiffs, to which the court refers, all concerned citizenship outside the context of CAFA where the parties' citizenship needed to be individually determined for *all* parties.<sup>90</sup> As will be discussed below, statistically speaking, the burden of citizenship to be proven under CAFA is substantially less. Nonetheless, courts have more often than not been strict in applying a rebuttable presumption of domicile where residence is proven.

### 3. Defining Class by Residence and Property Ownership

Some district courts have found residence *and* property ownership in the state sufficient to indicate that two-thirds of a plaintiff class were citizens of the state. In *Joseph v. Unitrin, Inc.*, the court found an action brought "individually and on behalf of all similarly situated Texas residents," with a class defined as all policyholders who paid premiums to a Texas-based insurance company for residential insurance coverage, sufficient to establish that two-thirds of the class were citizens of Texas.<sup>91</sup> The court relied on the theory that evidence of one's residence is *prima facie* proof of one's domicile,<sup>92</sup> finding there was "no indication of a mass exodus" from

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<sup>89</sup> *Id.*

<sup>90</sup> *See id.* at 800 (citing *Sligh*, 596 F.2d at 1171; *Fort Knox Transit*, 151 F.2d at 602; *Kelleam*, 112 F.2d 940).

<sup>91</sup> No. 1:08-CV-077, 2008 WL 3822938, at \*6 (E.D. Tex. Aug. 12, 2008).

<sup>92</sup> *Id.* at \*5 (citing *Stine v. Moore*, 213 F.2d 446, 448 (5th Cir. 1954)).

Texas by more than one-third of these purported residents.<sup>93</sup> The court further found that these policy owners were also likely to own homes in the state.<sup>94</sup>

A similar story played out in *Caruso v. Allstate Insurance Co.*, where, in the wake of Hurricane Katrina, a Louisiana district court found that a class, including all Louisiana homeowners who purchased insurance policies from the defendant insurance companies, could be reliably presumed to be comprised of at least two-thirds Louisiana citizens.<sup>95</sup> However, the plaintiffs' class definition was not expressly limited to residents, so the court construed the homeowner's insurance policy as both evidence of residence and intent to remain in the state.<sup>96</sup> While this evidence of residence does not establish a class of 100% residency (as a class definition limited to state residents would) because a group of non-resident home owners may exist (*e.g.*, members owning homes in multiple states and residing outside of Louisiana), the unique circumstances of Hurricane Katrina justify a departure from the stricter norm.<sup>97</sup>

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<sup>93</sup> *Id.* at \*6.

<sup>94</sup> *Id.* (“As these policies cover both the policyholder’s residence and household effects, it can be assumed that members of the putative class own both real and personal property in Texas.”).

<sup>95</sup> 469 F. Supp. 2d 364, 368 (E.D. La. 2007).

<sup>96</sup> *Id.* at 367 (“Given that no one disputes that Hurricane Katrina wrecked [sic] havoc on immovable property in Louisiana, the plaintiffs’ assertion that they represent a class of individuals covered by homeowner’s policies for homes that are located in Louisiana creates a reliable presumption that this is a class of Louisiana residents. Indeed, owning a home is an indicium of domicile.”).

<sup>97</sup> *Id.* at 368. Obviously, those members forced out of residence by the events of Katrina are forgiven, because “it is reasonable to assume that residents of these parishes might change their addresses in the immediate aftermath of the storm without changing their domiciles.” *Id.* In fact, a class definition limiting members to *actual* (remaining) Louisiana residents in this case would decrease the class size because the harm, by its nature, caused or forced class members out of their residence. *See id.* Rather, the court’s common sense consideration of Hurricane Katrina and use of homeowner policy possession as evidence of class members’ residential intent allows for a larger class of “would be” residents. *See id.*

The *Joseph* and *Caruso* rulings have been interpreted narrowly, such that homeownership and residence may be taken as sufficient evidence of domicile, but residence alone may not. For instance, in *Phillips v. Severn Trent Environmental Services, Inc.*, the district court rejected the plaintiff's contention that a class, defined as persons affected by allegedly hazardous drinking water and who were residents *or occupants* of a Louisiana apartment complex between May 15, 2007, and May 20, 2007 (less than one week), met the two-thirds citizenship requirement.<sup>98</sup> The plaintiff had failed to offer any evidence demonstrating domiciliary intent, and the class period had included only the brief month of May 2007.<sup>99</sup> Indeed, renters of an apartment, especially over such a shortly defined period of time, would be more likely to have only a transient presence in the state than homeowners.

#### 4. Defining Class as Employees in the State

In *Mattera v. Clear Channel Communications*, the United States District Court for the Southern District of New York found the local controversy exception's two-thirds citizenship requirement was met where the plaintiff class was defined as "all persons who *worked* for defendants as sales representatives at one of the New York radio stations and had their wages deducted at any time after March 9, 2000 to entry of judgment of this case."<sup>100</sup> The court required no further evidence and found it "reasonably likely that more than two-thirds of the putative class members of the proposed class—all of whom work[ed] in New York—[were] citizens of New York."<sup>101</sup>

<sup>98</sup> No. 07-3889, 2007 WL 2757131, at \*3 (E.D. La. Sept. 19, 2007).

<sup>99</sup> *Id.*

<sup>100</sup> *Mattera v. Clear Channel Commc'ns, Inc.*, 239 F.R.D. 70, 72 (S.D.N.Y. 2006) (emphasis added).

<sup>101</sup> *Id.* at 80.

### B. Representative Samples

In addition to showing state citizenship by refined class definitions, the *Nextel* court suggested that future plaintiffs can meet their burden of proof for showing that state citizens comprise two-thirds of the class by providing representative samples of class members indicating domiciliary intent, *e.g.*, affidavits or survey responses from potential class members.<sup>102</sup>

However, this solution is not without difficulties because plaintiffs may tailor their samples in a biased manner to achieve favorable results. For instance, in *Evans v. Walter Industries, Inc.*, the Eleventh Circuit rejected an affidavit provided by the plaintiffs' attorney attempting to show that because 93.8% of the class members were Alabama residents, two-thirds of the plaintiff class were likely citizens of Alabama.<sup>103</sup> Although the plaintiffs' sample was large, containing 10,118 potential class members, the court was skeptical of its neutrality because the affidavit made no mention of how the potential class members were selected.<sup>104</sup> More specifically, the plaintiffs were seeking to certify a class containing two types of class members: (1) injured individuals who were owners, lessees, or licensees of property on which the defendants "deposited waste substances" and (2) individuals who were injured by simply coming in contact with the defendants' waste substances.<sup>105</sup> Fatally, the plaintiffs did not state which class member "type" was predominantly present in the sample or even the class:

We do not know if these 10,118 people represent both the property damage and personal injury classes. We do not know if [the plaintiffs' attorney's] method favored people currently living in Anniston over people who have left the area. In short, we know nothing about the

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<sup>102</sup> *In re Sprint Nextel Corp.*, 593 F.3d 669, 675 (7th Cir. 2010).

<sup>103</sup> 449 F.3d 1159, 1166 (11th Cir. 2006).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 1165–66.

percentage of the total class represented by the 10,118 people on which plaintiffs' evidence depends. Moreover, the class, as defined in the complaint, is extremely broad, extending over an [eighty-five]-year period. We do not know if [plaintiff's attorney] made any effort to estimate the number of people with claims who no longer live in Alabama.<sup>106</sup>

Presumably, resident property owners, lessees, and licensees are more likely to be domiciliaries of the state, while those who were simply harmed by the toxic substances—but do not own, lease, or license property—are more likely to have only a transient presence in the state. In short, the lack of information provided by the plaintiffs in selecting individuals for their sample was interpreted suspiciously by the court for lack of neutrality.<sup>107</sup>

However, other courts have accepted facially unreliable evidence. In *Preston v. Tenet Healthsystem Memorial Medical Center* (hereinafter *Preston II*), a case endorsed by the *Nextel* court,<sup>108</sup> the Fifth Circuit also addressed the question of how much evidence is necessary to establish that two-thirds of potential class members are citizens of the state, in a class action brought for damages sustained during the Hurricane Katrina disaster.<sup>109</sup> There, the plaintiffs harmed by incidents of Katrina alleged that their hospital failed to maintain emergency power in its facilities and to develop an evacuation plan for patients.<sup>110</sup> The plaintiffs argued that two-thirds of the class was comprised of Louisiana citizens by producing affidavits showing that only seven of 256 admitted patients were registered as residents of states other than Louisiana and that two out of thirty-five deceased

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<sup>106</sup> *Id.* at 1166.

<sup>107</sup> *Id.*

<sup>108</sup> *In re Sprint Nextel Corp.*, 593 F.3d 669, 675 (7th Cir. 2010) (citing *Preston II* as an example of a case properly producing a “representative sample” for evidence of citizenship).

<sup>109</sup> *Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc. (Preston II)*, 485 F.3d 804, 823–24 (5th Cir. 2007).

<sup>110</sup> *Id.* at 815.

patients had given out-of-state addresses.<sup>111</sup> To show domiciliary intent, plaintiffs provided eight affidavits from class members indicating that they intended to return and remain in Louisiana.<sup>112</sup>

First, the defendants attempted to rebut the plaintiffs' evidence of residence by tracing the mailing addresses of potential class members located throughout the country through a private investigator, who found that forty-nine of 146 individuals identified as potential class members—slightly greater than one-third—resided outside of Louisiana, thus implying that less than two-thirds of the class were Louisiana residents.<sup>113</sup> Following the district court's reasoning, the Fifth Circuit rejected the defendants' rebuttal evidence because it failed to show these class members *intended to remain* outside of Louisiana.<sup>114</sup>

The defendants then attempted to discredit the plaintiffs' affidavits of domiciliary intent by arguing that they were subjective.<sup>115</sup> However, the court found the subjective nature of the affidavits unavailing, because the defendants failed to produce *objective* evidence showing that the plaintiffs had misrepresented their intentions: "This court gives little weight to statements of intent evidence, however, only when the subjective evidence conflicts with the objective facts in the record. [The defendants] point[] to no objective evidence in the record indicating that the affidavits misrepresented the plaintiffs' intent of returning to New Orleans."<sup>116</sup> Under this standard, requiring rebuttal of subjective statements of domiciliary intent by objective evidence, defendants would be foreclosed from countering with similar class member affidavits of subjective intent to remain *outside* of the state.<sup>117</sup> Defendants' burden

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 816.

<sup>116</sup> *Id.*

<sup>117</sup> *See id.*

of rebuttal is thus not equal to plaintiffs' burden of proof; it is far greater.<sup>118</sup>

In retrospect, it is not only troubling that the Fifth Circuit accepted a minuscule sample size of eight members—the smaller the sample size, the less probative the evidence<sup>119</sup>—but also that six of the eight affidavits were produced by *named class representatives*.<sup>120</sup> As opposed to unnamed class members, class representatives are often compensated for their service to the class through monetary incentives.<sup>121</sup> These awards are offered to class representatives as recognition for the “financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.”<sup>122</sup> Hence, class members have incentives to lie about things such as domicile,<sup>123</sup> which, because of its subjective nature, is difficult to overturn or prove otherwise.<sup>124</sup> In other cases, class representatives are little more than figureheads for litigation, with class counsel unilaterally directing the litigation.<sup>125</sup> Accordingly, the potential for fabrication and manipulation of

<sup>118</sup> *See id.*

<sup>119</sup> *Wheeler v. City of Columbus, Miss.*, 686 F.2d 1144, 1151 (5th Cir. 1982).

<sup>120</sup> *Preston II*, 485 F.3d at 815.

<sup>121</sup> *See* Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303, 1303 (2006) (noting that twenty-eight percent of class actions filed between 1993 and 2002 included incentive awards to class representatives.)

<sup>122</sup> *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009).

<sup>123</sup> *See id.* at 959.

<sup>124</sup> *See Preston II*, 485 F.3d at 816 (holding that subjective evidence of domiciliary intent is only undermined when it conflicts with objective facts).

<sup>125</sup> *See Unger v. Amedisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005) (“Class representatives must satisfy the court that they, and not counsel, are directing the litigation.”); *Scott v. N.Y.C. Dist. Council of Carpenters Pension Plan*, 224 F.R.D. 353, 356 (S.D.N.Y. 2004) (holding the named plaintiff as inadequate to represent the class because of an “alarming lack of familiarity with the suit,” as indicated by the plaintiff’s lack of knowledge of allegations contained in the complaint, his meeting with counsel only once in three years, and his statement that “he would leave every decision up to his attorney and never question his advice”).

affidavits by either class representatives or their attorneys may undermine the credibility of affidavits of domiciliary intent.

Despite the irksome aspects of the Fifth Circuit's ruling, the influence of the extreme circumstances of the Hurricane Katrina events on the court's ruling should not go unnoticed:

The underlying facts of this lawsuit and the reason for the parties contesting the citizenship issue emanate from a common origin of circumstances: the unmerciful devastation caused by Hurricane Katrina. As an inevitable result of the property damage and evacuation, a great majority of the city's population either temporarily or permanently relocated to habitable areas of Louisiana and other states. In this case, the aftermath of Hurricane Katrina and attendant flooding serves as a common precipitating factor for the mass relocation pertinent to our citizenship determination and threads together the proposed class and many other citizens.<sup>126</sup>

Hence, the court took note of the overall circumstances, and utilized common sense to draw the inference that at least two-thirds of the class members intended to remain in Louisiana, despite the plaintiffs' paltry production of eight affidavits to establish domiciliary intent.<sup>127</sup>

The District Court for the Eastern District of Louisiana accepted similarly skewed evidence in *Martin v. Lafon Nursing Facility of the Holy Family, Inc.*<sup>128</sup> The plaintiff filed a class action suit<sup>129</sup> against a nursing home, accusing the defendant of negligence in

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<sup>126</sup> *Preston II*, 485 F.3d at 817.

<sup>127</sup> *Id.*

<sup>128</sup> 548 F. Supp. 2d 268, 276 (E.D. La. 2008).

<sup>129</sup> *Id.* at 280. The class was defined as “[a]ll persons, except Defendants’ employees, who sustained injury and/or damage . . . as a result of unreasonable dangerous conditions and/or defects in and/or on the premises of LAFON on or about August 29, 2005, and/or as a result of the failure of LAFON to attain, maintain, and/or provide an adequate means of transportation to timely and/or safely

failing to protect the nursing home's residents from the "effects" of Hurricane Katrina.<sup>130</sup> In support of a motion to remand to state court via the home-state and local controversy exceptions, the plaintiff provided subjective evidence of domiciliary intent via questionnaire responses from class members.<sup>131</sup> The questionnaires revealed that fifty-three of the sixty-eight class members (75%) who responded were citizens of Louisiana.<sup>132</sup> Following the standard that the Fifth Circuit adopted in *Preston II*, the district court found the questionnaires sufficient to establish that two-thirds of the plaintiff class was comprised of Louisiana citizens because the defendant had not presented objective evidence "indicating that the questionnaires misrepresent[ed] the putative class members' intent" nor "argued that the questionnaire responses [were] not authentic."<sup>133</sup>

To establish that the questionnaires "misrepresent[ed] the putative class members' intent" as a whole, the defendant argued that the sample of questionnaire responses contained an abnormally high proportion of state citizens because the post office had stopped forwarding mail to persons forced out of the state.<sup>134</sup> This allegedly implied that a smaller percentage of out-of-state class members would receive and respond to the questionnaires than remaining state residents, and presumably, it was less likely that class members forced out of the state intended to return and remain in the state.<sup>135</sup>

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move persons off its premises in the wake of Hurricane Katrina, and the failure of LAFON to provide adequate medical care in the wake of Hurricane Katrina." *Id.* at 270.

<sup>130</sup> *Id.* at 280.

<sup>131</sup> *Id.* at 273.

<sup>132</sup> *Id.* at 273-74.

<sup>133</sup> *Id.* at 276.

<sup>134</sup> *Id.*

<sup>135</sup> See *id.* The defendant's argument used the same reasoning accepted by the court in *Evans v. Walter Industries, Inc.*, where the court rejected the plaintiffs' sample evidence of citizenship showing that 93.8% of a class of (1) property owners and (2) non-property owners injured by the defendants' toxic substances were residents of the state. 449 F.3d 1159, 1166 (11th Cir. 2006). The plaintiffs did not indicate the composition of property owners versus non-property owners in the

The district court dismissed the defendant's argument, finding that "[t]he fact that not all potential class members responded" did not preclude the court from "assum[ing] that these responses [were] representative of the class as a whole."<sup>136</sup> More importantly, the court cited *Preston II* and quoted the portion of the Fifth Circuit's opinion qualifying the extreme circumstances of the Katrina events as reason to presume that residents forced out of the state intended to return.<sup>137</sup>

The *Preston II* and *Martin* decisions unveil suspicions about the actual utility of evidence of domiciliary intent. The events of Katrina, while extreme, were no more than a backdrop for the Fifth Circuit to apply a presumption of continuing domicile.<sup>138</sup> However, a presumption of continuing domicile requires that domicile be established by class members in the first place, and in *Preston II*, aside from the questionable eight affidavits of domiciliary intent, the only evidence that the plaintiffs provided was of residence.<sup>139</sup> Indeed, when the *Preston II* court stated that "[e]ven though eight affidavits may

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sample, and property owners were presumably more likely to be domiciliaries of the state. *Id.*

<sup>136</sup> *Martin*, 548 F. Supp. 2d at 276. However, this particular line of reasoning misconstrues the defendant's argument. The defendant contested the questionnaire sample's *composition*, not *size*. *See id.* at 274.

<sup>137</sup> *Id.*; *see Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc. (Preston II)*, 485 F.3d 804, 817 (5th Cir. 2007).

<sup>138</sup> *See Preston II*, 485 F.3d at 818 ("[W]e find no precedential support for the notion that a forced relocation (especially, a mandatory evacuation prompted by a natural disaster) destroys the presumption of continued domicile."); *Denlinger v. Brennan*, 87 F.3d 214, 216 (7th Cir.1996) ("[S]ince domicile is a voluntary status, a forcible change in a person's state of residence does not alter his domicile; hence the domicile of [a] prisoner before he was imprisoned is presumed to remain his domicile while he is in prison. . . . [T]he presumption articulated in *Sullivan* is rebuttable, but on this meager record it has not been rebutted.") (internal citations and quotations omitted); *Fort Knox Transit v. Humphrey*, 151 F.2d 602, 602-03 (6th Cir.1945) ("[U]pon the whole record and in the absence of any challenge to the jurisdiction, the plaintiff's residence in Ohio is *prima facie* evidence of his citizenship in that state and is not overthrown by residence in Kentucky as a member of the Armed Forces of the United States, and there being no substantial evidence of voluntary relinquishment of an Ohio domicile").

<sup>139</sup> *See Preston II*, 485 F.3d at 815.

constitute a small number of statements outside the unique convergence of facts presented in this case, we find that here, *the affidavits amplify the court's carefully reasoned conclusion about the probable citizenship of the proposed class,*" it appears that the court was seeking confirmation to justify its own "guesswork" about the probable citizenship of the class, rather than evidence that adequately bore on the question of intent in its own right.<sup>140</sup>

#### IV. CONSTRUING STATISTICAL SIGNIFICANCE

In discussing the solution of providing evidence of domiciliary intent through representative samples, the Seventh Circuit in *Nextel* stated that a level of statistical significance "greater than [fifty] percent would have allowed the district court to conclude that the plaintiffs had established the citizenship requirement by a preponderance of the evidence."<sup>141</sup> This level of statistical significance is admittedly less than the 95% level normally required by scientists and statisticians.<sup>142</sup> Indeed, this standard merely requires the fact-finder to believe that the alleged hypothesis is "more likely than not" and "inherently, it allows the fact-finder to assess risks, to measure probabilities, [and] to make subjective judgments."<sup>143</sup>

However, the obscure notion of statistical significance has generated much confusion in courts and its application to evidence standards.<sup>144</sup> For example, statisticians employ different standards for

<sup>140</sup> See *id.* at 818 (emphasis added).

<sup>141</sup> *In re Sprint Nextel Corp.*, 593 F.3d 669, 676 (7th Cir. 2010) (citing *Ethyl Corp. v. EPA*, 541 F.2d 1, 28 n.58 (D.C. Cir. 1976) (discussing the acceptable probability of error for evidence in great detail)).

<sup>142</sup> *Id.* ("Statisticians and scientists usually want at least 95% certainty"); *Ethyl Corp.*, 541 F.2d at 28 n.58 ("Typically, a scientist will not so certify evidence unless the probability of error, by standard statistical measurement, is less than 5%. That is, scientific fact is at least 95% certain.").

<sup>143</sup> *Ethyl Corp.*, 541 F.2d at 28 n.58 (emphasis added).

<sup>144</sup> Michelle M. Mello, *Using Statistical Evidence to Prove the Malpractice Standard of Care: Bridging Legal, Clinical, and Statistical Thinking*, 37 WAKE FOREST L. REV. 821, 839–40 (2002).

accepting Type II errors from Type I errors in their studies.<sup>145</sup> A Type I error occurs when a study mistakenly *rejects* the *null hypothesis* (the hypothesis *against which* the statistician seeks to provide evidence, in order to prove the *alternative hypothesis*).<sup>146</sup> A Type II error occurs when a study mistakenly *accepts* the null hypothesis.<sup>147</sup> By convention, statisticians accept a Type II error rate of 20% and a Type I error rate of 5%.<sup>148</sup> Here, if a plaintiff were trying to prove that two-thirds of the proposed class members are citizens of the state, the null hypothesis would (roughly) be that the evidence that the plaintiff provided does not establish citizenship. Hence, were a statistician to act in accord with convention, he or she would accept data more likely to disprove the plaintiff's claim than to support it (*i.e.*, accepting a higher rate of Type II error than Type I error).<sup>149</sup> Why should the plaintiff, who already bears the burden of showing citizenship of the class, be further hamstrung by statistical conventions?

Moreover, interpretation of the P-value (on which statistical significance is based) is often a mystery in courts, because the P-value does not say anything about causation.<sup>150</sup> Rather, the calculated P-value indicates the probability that the sample data would result if the null hypothesis were true.<sup>151</sup> For example, imagine that plaintiffs provided data indicating that 67% of a sample of class members, who are residents of and owned property in the state, are also citizens of the state. The null hypothesis might be that residence and in-state property ownership of members in this class correlate with citizenship at a rate *less than 67%* (*i.e.*, insufficient to establish citizenship of the class), while the alternative hypothesis would be that residence and property ownership correlate with citizenship *at least 67%* of the time (*i.e.*,

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<sup>145</sup> *Id.* at 840.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 840 n.54.

<sup>149</sup> *See id.* at 840 & n.54.

<sup>150</sup> *Id.* at 842.

<sup>151</sup> D.H. Kaye, *Is Proof of Statistical Significance Relevant?*, 61 WASH. L. REV. 1333, 1342 (1986).

sufficient to establish citizenship of the class). If a statistician, trying to determine whether this sample was truly representative of the class as a whole, calculates a P-value of 0.49 for the study, that means there is a 49% chance that the plaintiffs' *sampling* of class members would have selected citizens at the rate of 67%, even if *less than* 67% of the *total* class members were actually citizens of the state (*i.e.*, if the null hypothesis were true).<sup>152</sup> To calculate statistical significance, the statistician then easily computes the *confidence coefficient*, which is simply one minus the P-value (here, 0.51).<sup>153</sup> This implies that there is a 51% chance that the plaintiffs' sampling of class members would have selected a group composed of 67% citizens in a world where at least 67% of those class members with residency and owning property were actually citizens of the state (*i.e.*, if the alternative hypothesis were true).<sup>154</sup>

However, statistical significance does not establish confidence in the hypothesis test itself and the parameters upon which it rests.<sup>155</sup> This issue is exacerbated by the ability of plaintiffs to tailor the variety of available statistical methods to their own goals.<sup>156</sup> For instance, a manipulative statistician could take a large sample of data and select favorable portions to create a smaller tailored sample demonstrating what his party seeks to prove.<sup>157</sup> Of course, the statistician would have to account for the fact that a decrease in sample size also decreases the statistical significance of the test.<sup>158</sup>

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<sup>152</sup> *See id.*

<sup>153</sup> *See id.* at 1339 (indicating that a P-value of 0.51 is not sufficient to deem the study statistically significant at the 0.05 level, because the P-value is less than 0.95).

<sup>154</sup> *See id.* at 1342.

<sup>155</sup> Marcel C. Garaud, Comment, *Legal Standards and Statistical Proof in Title VII Litigation: In Search of a Coherent Disparate Impact Model*, 139 U. PA. L. REV. 455, 467 (1990).

<sup>156</sup> *Id.* at 461.

<sup>157</sup> *See Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1166 (11th Cir. 2006) (doubting genuineness of the plaintiff's sample because the method for selecting persons in the representative sample was not disclosed).

<sup>158</sup> *See Garaud, supra* note 155, at 462.

Moreover, the required reliability of sample evidence to establish citizenship is diminished in the context of the two-thirds requirement of the CAFA home-state and local controversy exceptions. For instance, consider a sample plaintiff class, *exactly* meeting the two-thirds citizenship requirement: there is a two-thirds (66.6%) chance that any *single randomly selected member* of this class is a citizen of the state. This is a logically diminished burden in contrast to the usual situation in diversity jurisdiction disputes where the citizenship of *all* (100%) individual parties must be established by a preponderance of the evidence.

Overall, it is not clear that statistical evidence from a representative sample offers substantial benefits to the court in determining citizenship of a class. As discussed above, the potential for manipulation of sample data and for court and jury misinterpretation are far too great to justify the costs of obtaining experts and collecting data, especially in the face of an unconventionally low required significance level of merely 51% for proving that two-thirds of the members of a class are citizens of the state. The potential for confusion is exacerbated because courts often use their own intuitions, instead of referring to statistics experts, to estimate the probative value of plaintiffs' evidence.<sup>159</sup> What objectivity is actually gained if courts still use their own unqualified, subjective intuitions to evaluate the probative value of these sample studies?

## CONCLUSION

The Seventh Circuit's decision to require plaintiffs to submit evidence of domiciliary intent, or to limit class definitions to include only citizens of the state, has severely hampered the ability of plaintiffs to utilize the class action device at the state level. On the one hand, providing such evidence likely entails locating unknown class

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<sup>159</sup> See *Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc. (Preston II)*, 485 F.3d 804, 816 (5th Cir. 2007); *Evans*, 449 F.3d at 1166; *Martin v. Lafon Nursing Facility of the Holy Family, Inc.*, 548 F. Supp. 2d 268, 276 (E.D. La. 2008).

members for response to questionnaires, and providing such evidence can be unduly expensive. If courts wish to objectively and fairly evaluate such representative samples, they must utilize experts to evaluate the statistical implications of these studies, driving the costs of litigation even further up, and diminishing plaintiffs' potential for recovery. On the other hand, if courts do not utilize experts, the lack of judicial expertise on statistical matters, the potential for confusion and misinterpretation, and the ability of parties to manipulate and produce biased results implicates the concerns of unreliability caused by subjective judgments and "guesswork" estimations that the Seventh Circuit sought to avoid by requiring evidence in the first place. Moreover, requiring plaintiffs to define their class in terms of citizenship as an economically feasible alternative deprives non-citizens of the remedies available to citizen class members who were similarly wronged. Lastly, reliance on old principles of proving domicile, while relevant, should not be imported wholesale into the context of CAFA class action jurisdiction, where the citizenship of class members need not be shown. Accordingly, the Seventh Circuit should adopt a presumption of domicile where the class is defined to include only residents, especially since a defendant's burden under CAFA for showing diversity is so easily met under the minimal diversity standard. By failing to adopt a rebuttable presumption of domicile, the Seventh Circuit has undermined the principles of practicality, reasonableness, and judicial economy that the class action was intended to promote.